

After reviewing the record compiled to date and considering the arguments of the parties, the Appeals Board (Board) finds that the ALJ's Order should be reversed.

Claimant alleges she injured her low back at work on April 1, 2001 “and every day after.”<sup>1</sup> At the April 2, 2002, preliminary hearing, however, claimant stated that the accident “occurred on or about April 1, 2001, and requested temporary total disability compensation beginning April 28, 2001.”<sup>2</sup>

At the April 2, 2002 preliminary hearing, claimant presented the testimony of a co-worker, Juan Guzman Gonzales. Mr. Guzman testified that he worked in the hide department at Rose America and that he also assisted claimant who worked at a machine that made dog collars. That machine’s operation included the use of a foot pedal. According to Mr. Guzman, claimant first complained of back pain after returning from a trip to Mexico. Mr. Guzman told her that she needed to talk with one of her supervisors but he did not know whether or not she did that. Claimant worked for a short period of time after returning from Mexico before leaving work to have back surgery. Mr. Guzman testified that he never had any conversations with any of his supervisors regarding claimant’s back condition. Mr. Guzman was the only witness to testify at the April 2, 2002 preliminary hearing.

Mr. Guzman’s testimony is not particularly relevant nor helpful because he was on vacation during the first week of April when claimant experienced the onset of her symptoms. Mr. Guzman did not return to work from his vacation until after April 13 while claimant was on leave to attend the funeral in Mexico. He did confirm, however, that claimant was having leg complaints during the time they worked together after her return from Mexico. There was no indication from Mr. Guzman that claimant was injured during her time away from work. Although he made no reference to it being a work related injury, Mr. Guzman did advise claimant to report her condition to a supervisor. But there was no indication that claimant told him that she had either already reported it or planned to report it.

Claimant also offered the report of the independent medical examination performed by Pedro Murati, M.D., in which he concludes:

this patient’s diagnoses are within all medical probability a direct result from the work related injury that occurred on 04-01-01, during the patient’s employment with Rose America.<sup>3</sup>

---

<sup>1</sup> Claimant’s form K-WC E-1 Application for Hearing filed June 1, 2001.

<sup>2</sup> Tr. of Prel. H. at 4 (April 2, 2002).

<sup>3</sup> Tr. of Prel. H., Claimant’s Ex. 1 (April 2, 2002).

Dr. Murati's report does not contain a section entitled "diagnoses" but his "impression" was "low back pain secondary to status post L4-5 laminectomy with microdiscectomy." Respondent points out that April 1, 2001 was a Sunday and that claimant admitted she did not work on that Sunday.

Claimant's testimony is contained in the transcript of the August 2, 2001 preliminary hearing. At that time, claimant testified that she had never suffered any prior injury to her low back and that her low back was fine before April 2001. In April 2001 she had worked for respondent over four years. Her job involved operating a machine to make holes in dog collars. The machine was operated from a sitting position and required the use of her hands and feet. She testified that she would spend eight to ten hours a day sitting at work. Around the 1<sup>st</sup> of April, 2001 she began experiencing right leg pain from the waist all the way down the leg to the foot. The pain kept getting worse during the first few days of April. Claimant said she first experienced the pain at work. She denied any activities at home or away from work that caused the pain.

Claimant said she first complained to one of her supervisors, named Van. According to claimant, she told Van that it was working on the machine that caused her leg pain and that she needed to go to the doctor. Claimant also testified that she did not understand the process for reporting an on-the-job injury. She acknowledged on cross examination, however, that she received an employee booklet outlining the company policies and procedures but said she did not understand it. Nevertheless, she did know that she was to report accidents and that is why she told Van that her leg was hurting from working on the machine. On cross examination claimant also clarified that during the first week of April she told Van that her leg hurt but that it was not until the end of April that she asked to see a doctor. Claimant acknowledged that she was off work from April 13 through April 19 to attend the funeral of a family member in Mexico. She returned to work on Friday, April 20, 2001.

When asked why Dr. Fernandez' office notes of April 30, 2001 did not mention work as the cause of claimant's problems, claimant answered that the doctor did not ask her that question. He asked her what type of work she did and she answered that she worked at a machine. She denied any accidents such as a fall. Claimant acknowledged that neither Dr. Fernandez' bill nor the bill for Wesley Medical Center was submitted as workers' compensation. She did, however, make a written claim for compensation on May 22, 2001.<sup>4</sup> At the hospital on May 3, 2001, claimant gave a history of right calf pain during the past three weeks, which has been increasing in severity to the point that she can not bear weight. The medical record notes that the history was obtained via an interpreter as the

---

<sup>4</sup> Tr. of Prel. H., Claimant's Ex. 4 ( Aug. 2, 2001).

patient is primarily Spanish speaking.<sup>5</sup> This history of pain for three weeks would place the onset as approximately April 12, 2001, which would have been the last day claimant worked before leaving work to attend the funeral in Mexico.

Vanhaving Phanivong, claimant's supervisor, who is known as Van also testified at the August 2, 2001 preliminary hearing. She denied any recollection of claimant complaining about leg pain during April 2001. Sometime during the first week of May, 2001 she called claimant's home to find out why claimant had not returned to work. Claimant was home but had Van speak with her son because he was more fluent in English. According to Van, claimant's son said that his mother was not at work because she was not feeling well. He said, "she was doing backyard work and fell down."<sup>6</sup> "She had hurt her ankle is what he said on the phone."<sup>7</sup> Ms. Phanivong told claimant's son to let his mother know that the doctor needed to fax an off-work excuse to the employer. Ms. Vanhaving Phanivong estimated that this telephone conversation took place about one week after claimant last worked on April 27, 2001. Because claimant was home when Ms. Phanivong called, this telephone conversation must have either taken place before claimant was admitted to Wesley Medical Center on May 3, 2001 and discharged May 11, 2001 or else more than one week after claimant's last day of work. Ms. Phanivong said that it was about two weeks after that conversation that she learned claimant was making a workers compensation claim against respondent and said this was her first knowledge that a work related injury was being alleged. Ms. Phanivong was asked what she would have done if claimant told her that work had caused her problem in her leg. She answered "I would recommend her [sic] like the other employees, go see your doctor and bring in a note. If you need some time off, I will work that out with you."<sup>8</sup> This is the course of action the claimant apparently followed.

The conflict between the claimant's testimony and Ms. Phanivong's lies in whether or not claimant made complaints to Ms. Phanivong about claimant's leg. Ms. Phanivong said that she was not aware of the company having any information concerning why claimant was off work at that time. Ms. Phanivong testified that she had contact with claimant on a daily basis when claimant was at work during April 2001 and never got a complaint from her about her leg hurting and claimant never appeared to be in any type of pain, either before or after claimant's trip to Mexico. Claimant testified that she gave Dr. Fernandez' off-work slip to respondent's secretary and explained to her that she could

---

<sup>5</sup> Tr. of Prel. H., Claimant's Ex. 3 (Aug. 2, 2001).

<sup>6</sup> Tr. of Prel. H. at 42 (Aug. 2, 2001).

<sup>7</sup> Tr. of Prel. H. at 44 (Aug. 2, 2001).

<sup>8</sup> Tr. of Prel. H. at 53 (Aug. 2, 2001).

not return to work because her leg was hurting.<sup>9</sup> However, claimant was not asked and did not say when she turned in that off-work slip. One would assume that this occurred before claimant was admitted to the hospital and probably on the same day that she was seen by Dr. Fernandez which was Monday, April 30, 2001. For some reason, however, this information did not get communicated to claimant's supervisor, Ms. Phanivong. Her testimony became further clouded when Ms. Phanivong later said that at some point the company did receive an off-work slip from Dr. Fernandez that showed claimant would be off until May 3<sup>rd</sup> and that it was about a week after the May 3<sup>rd</sup> date that she got curious about why claimant was not back at work and called her home. Accordingly, that would indicate that the conversation took place after claimant's release from Wesley Medical Center. It would be even more strange, therefore, for claimant's son to refer to his mother's injury as an ankle injury when she would have already undergone back surgery. It is impossible to ascertain when the telephone conversation took place from Ms. Phanivong's testimony. She is obviously confused about the date of the telephone conversation and the date when she first became aware that claimant had been taken off-work by a physician.

Claimant's son Hector Manuel Hernandez, age 16, testified that he recalled having a telephone conversation with a woman from Rose America about his mother not coming to work after her surgery. He said that he told her his mother had serious back pain and that her leg was hurting her real bad. He denies saying anything about where or how his mother got hurt and specifically denies saying anything about her hurting herself while working in the backyard. He does not know the name of the person he spoke with, but this was the only telephone conversation he had with anyone from Rose America. Hector also testified that his mother would come home from work complaining about pain in her right thigh and he and his father would massage her leg for her. It was his recollection that this occurred many times during the month before her surgery. He was also asked about the trip to Mexico and said that they traveled 24 hours by car each way. He acknowledged that his mother likewise complained about her back and leg hurting during that drive.

Mr. Rick Norris, Director of Human Resources for respondent, testified that his first knowledge of claimant alleging a work-related injury was when he received the letter from her attorney at the end of May 2001. He described the company policy for on-the-job injuries which included sending the worker to certain health care providers if necessary and to make a written accident report. He added that they have few injuries and most are minor.

---

<sup>9</sup> Tr. of Prel. H. at 37 (Apr. 2, 2001).

Although claimant has lived in Wichita, Kansas, for 17 years, she obviously has difficulty with the English language. This language problem was evident in the hospital and caused a delay in her leg pain being recognized as radiculopathy.

The patient was admitted for evaluation of right lower extremity pain. At time of admission, it was not clear the extent of the language barrier, and a translator assisted with the initial discussion. During that discussion, it appeared that the patient's primary complaint was in her right calf. For this reason, initial investigation centered on the calf itself.<sup>10</sup>

Just as the language barrier affected claimant's medical treatment it could have likewise affected her communication with her supervisor, Ms. Phanivong. It is apparent from a reading of Ms. Phanivong's testimony that English is probably not her first language either. There is no indication in the record, however, that Ms. Phanivong is fluent in Spanish. Accordingly, it is easy to understand that claimant could have problems communicating with her supervisor. Furthermore, Ms. Phanivong testified that she would ask claimant how she was doing in passing as she walked by her work station just as she did with other employees. This type of inquiry is not conducive to an elaborate explanation of one's physical condition. Nevertheless, the inconsistency between claimant's testimony and Ms. Phanivong's is difficult to understand. One would think a worker with a herniated disc would have difficulty performing even sedentary work. The absence of any obvious signs of discomfort might lead one to wonder whether the injury occurred over the weekend just prior to claimant being seen by Dr. Fernandez on Monday, April 30, 2001. However, the testimony of Mr. Guzman established that claimant complained of pain to him at work the week before. We do not know whether the conversation between claimant and Mr. Guzman was in English or Spanish.

The medical evidence in this case is not limited to only records and reports. The deposition of claimant's treating physician at the hospital, neurosurgeon Raymond Wallace Grundmeyer III, M.D. was taken on January 22, 2002. Dr. Grundmeyer had never given a deposition before and was obviously uncomfortable giving an opinion. While vacillating between what was a probability as opposed to a possibility, the gist of his testimony was that he considered claimant's work to be a likely cause of her injury. Dr. Grundmeyer was called in as a consultant after an MRI of the lumbar spine was performed and showed a disc herniation. He eventually performed surgery. He recalled claimant's English was poor and that a family member was present to translate. His records do not have anything that suggested a cause for claimant's injury, but Dr. Grundmeyer conceded that he did not specifically ask for a cause. He said he was more concerned with discussing treatment

---

<sup>10</sup> Tr. of Prel. H., Claimant's Ex. 3, Discharge Summary, p. 2 (Aug. 2, 2001).

options with the patient rather than determining a cause for the disc herniation. The surgery was performed on May 8, 2001 for the L4-5 disc herniation with radiculopathy.

At some point after claimant was discharged from the hospital, Dr. Grundmeyer discussed with her what could have caused claimant's injury although he does not have any notes concerning that conversation. He recalls claimant described working all day sitting at a machine and moving her legs throughout the day. Claimant described this repetitive activity as causing her discomfort. Dr. Grundmeyer believed this could have contributed to the disc herniation. When asked whether or not that contribution was more probable than not to a reasonable degree of medical certainty, Dr. Grundmeyer equivocated between what was a possibility and what was a probability. From a medical standpoint he was unable to appreciate a distinction between the two terms. He did say that many things can contribute to a disc herniating, including some underlying weakness of the disc, some degenerative quality of the disc, some unknown degenerative quality of the disc, as well as any kind of stress or mechanical force in that area including a prolonged type of stress or a sudden stress like a trauma.

Oftentimes some type of bending, along with lifting, it can be an instigator. But there is [sic] a variety of mechanical stressors on the low back that can contribute, and it's very difficult to pinpoint one specific type of movement or flexion, extension, lateral movement, that would be the absolute cause.<sup>11</sup>

Dr. Grundmeyer said repetitive motion "conceivably" can mechanically contribute to a herniated disc. At his deposition, Dr. Grundmeyer also testified "I formed an opinion that the type of activity that she did at work would have contributed to a disc herniation."<sup>12</sup>

In a report letter before his deposition, Dr. Grundmeyer said that the disc herniation is "possibly work related but not accident related."<sup>13</sup> That report was apparently amended, although the date of the report was not changed, to read, "It is felt that the patient's condition is due to the type of repetitive motions she is required to do at work, and that the herniation is, within a reasonable degree of medical certainty, work related, but not accident related."<sup>14</sup> But at his deposition he also said, "There was no specific incident, that I can remember her describing, that was a sudden onset, but that her repetitive motion can be a type of activity that can contribute to a disc herniation and, therefore, that that activity

---

<sup>11</sup> Depo of Raymond Wallace Grundmeyer, III, M.D., p. 18 (Jan. 22, 2002).

<sup>12</sup> Depo of Raymond Wallace Grundmeyer, III, M.D., p. 29 (Jan. 22, 2002).

<sup>13</sup> Depo of Raymond Wallace Grundmeyer, III, M.D., Ex. 3 (Jan. 22, 2002).

<sup>14</sup> Depo of Raymond Wallace Grundmeyer, III, M.D., Ex. 4 (Jan. 22, 2002).

could be related to a disc herniation.”<sup>15</sup> Ultimately, Dr. Grundmeyer stated that there was no way to definitely know what caused claimant’s disc herniation.

Respondent challenges the sufficiency of the medical evidence. An expert medical opinion, however, is not necessary to prove causation. Furthermore, there is no expert medical opinion that contradicts claimant’s contentions.

The last day claimant worked for respondent was Friday, April 27, 2001. Her next regular work day would have been Monday, April 30, 2001. She did not go to work that day but instead went to Dr. Fernandez who took her off-work. Claimant testified that she worked her entire shift on Friday, April 27. This was the day claimant said she told Van, her supervisor, that she was feeling bad and wanted to go to a doctor. Because respondent did not provide her with medical treatment, claimant went on her own to a Dr. Fernandez. He took her off work but her symptoms did not improve. On May 3, 2001 she went to the emergency room of Wesley Medical Center and eventually underwent back surgery. As of August 2, 2001, when claimant testified, she had not returned to work.

Based on the evidence presented to date, the Board finds that claimant’s work activities caused or contributed to her injury. The Board further finds that claimant has proven that she suffered a series of accidents ending on April 27, 2001, her last day of work.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes should be, and is hereby, reversed and this matter is remanded to the administrative law judge for further orders consistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2002

---

BOARD MEMBER

c: Thomas T. Inkelaar, Attorney for Claimant  
Jeffery R. Brewer, Attorney for Respondent  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

---

<sup>15</sup> Depo of Raymond Wallace Grundmeyer, III, M.D., p. 31( Jan. 22, 2002).

